ME COURT, U. S.

74-1163

FILED
MAR 14 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Fourth Circuit

UNITED STATES OF AMERICA,
Respondent,

v.

EDGAR FORREST CRITZER,
Petitioner.

UNITED STATES OF AMERICA,
Respondent,

v.

ROBERT W. CRITZER,
Petitioner.

HUMES J. FRANKLIN, JR.
P. O. Drawer 1140
Waynesboro, Virginia 22980

TABLE OF CONTENTS

References to Opinions of Courts Below 2

Grounds of Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes 3

Statement of the Case 3

Reasons for Allowance of the Writ of Certiorari 7

Conclusion 13

Appendix of Judgments, Constitutional Provisions, and Statutes 14

Certificate of Service 20

TABLE OF CITATIONS

Cases

Desist v. United States, 394 U.S. 244 (1969) 10, 11

Katz v. United States, 389 U.S. 347 (1967) 10, 11

Lopez v. United States, 373 U.S. 427 (1963) 11, 12

On Lee v. United States, 343 U.S. 747 (1952) 10, 11

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ... 8, 9

United States v. White, 401 U.S. 745 (1971) .. 10, 11, 12

Statutes

United States Code:
18 U.S.C. § 2 5
18 U.S.C. § 371 5
18 U.S.C. § 912 5
18 U.S.C. § 2511 7
18 U.S.C. § 2515 ..... 7, 8
18 U.S.C. § 3231 5
28 U.S.C. § 1254 2

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REFERENCES TO OPINIONS OF COURTS BELOW

Petitioner Edgar Forrest Critzer was sentenced on July 18, 1974, in the United States District Court for the Eastern District of Virginia, Richmond Division, by an unreported Judgment and Commitment Order signed by U. S. District Judge Albert V. Bryan, Jr., which order is set out in the Appendix hereto.

Petitioner Robert W. Critzer was sentenced on July 31, 1974, in the United States District Court for the Eastern District of Virginia, Richmond Division, by an unreported Judgement and Commitment Order signed by U. S. District Judge D. Dortch Warriner, which order is set out in the Appendix hereto.

Petitioners convictions were affirmed on appeal to the United States Court of Appeals for the Fourth Circuit in an as yet unreported per curiam decision entered February 12, 1975, which decision is set out in the Appendix hereto.

GROUNDS OF JURISDICTION

Jurisdiction of this court is invoked under Title 28 United States Code § 1254 for review by writ of certiorari to the United States Court of Appeals for the Fourth Circuit on the final decision entered February 12, 1975.

QUESTIONS PRESENTED

I.

Did The Court Of Appeals Err In Failing To Find Reversible Error In The District Court's Denial Of The Motion To Suppress Tape Recordings Of

Conversations Between The Petitioners And Grady Wortham As Grady Wortham Did Not Give His Full Voluntary And Uncoerced Consent To The Placing of An Electronic Listening Device In His Automobile?

II.

Did The Court Of Appeals Err In Failing To Find Reversible Error In The District Court's Denial Of The Motion To Suppress Tape Recordings Of Conversations Between The Petitioners And Grady Wortham Which Tape Recordings Were Obtained In Violation Of The Fourth Amendment To The United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fourth Amendment.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 United States Code § 2511 and § 2515 set forth in Appendex hereto.

STATEMENT OF THE CASE

Grady Wortham was served with a warrant and arrested by the F.B.I. for his alledged participation in a scheme to commit the offense of impersonating a federal officer on February 6, 1974. At the time of his arrest and on two other occasions, he was asked by

F.B.I. agents to assist them with the case. Without the benefit of counsel, Mr. Grady Wortham went to Richmond at the request of F.B.I. agent Charles Evans. At this meeting Mr. Wortham agreed to assist the F.B.I. in making tape recordings of conversations between himself and the other participants, the petitioners herein, in the offense. Mr. Wortham later testified at the June 20, 1974 hearing on Edgar Forrest Critzer's motion to suppress evidence that although no specific promises were made by the government agents securing his agreement to cooperate he felt that his cooperation would help his case.

On March 21, 1974, Agent Evans and Mr. Wortham met at Afton Mountain and proceeded to the vicinity of Waynesboro, Virginia. They went to the home of Robert W. Critzer at Highland Hills Apartments in Stuarts Draft, Virginia for the purpose of obtaining tape recordings of a conversation between Mr. Wortham and Robert W. Critzer involving the participation of the petitioners in an alledged offense committed in Ashland, Virginia. No warrant was obtained to sanction this activity. Mr. Wortham asked Mr. Robert W. Critzer, a close, personal friend, to accompany him to his automobile. Agent Evans had previously placed a transmitting device in Mr. Wortham's automobile. Mr. Wortham and Mr. Critzer had a conversation in the automobile which was intercepted and recorded by Agent Evans. The conversation took place in the privacy of the automobile as the windows were rolled up. The same procedure was followed on March 23, 1974.

On March 28, 1974, Mr. Wortham actively sought out Edgar Forrest Critzer and asked Mr. Critzer to accompany him to his automobile. Mr. Critzer did accompany Mr. Wortham to a parking lot in the vicinity of the B & B Grocery in Waynesboro, Virginia. Agent Evans had again previously placed a trans-

mitting device in Mr. Wortham's automobile. The conversation took place between Mr. Wortham and Mr. Critzer concerning the details of the alledged offense. Agent Evans again intercepted and recorded the conversation taking place in the automobile.

Edgar Forrest Critzer and Robert W. Critzer, petitioners herein, were indicted on April 9, 1974 for violations of Title 18 U.S.C. §§ 2 and 912 and for conspiracy to commit such offenses under Title 18 U.S.C. § 371. Edgar Forrest Critzer was specifically indicted for impersonating a federal officer in order to obtain a thing of value. Robert W. Critzer was specifically indicted for aiding and abetting Edgar Forrest Critzer in committing the offense.

The petitioners herein were arraigned on April 29, 1974 and both entered a plea for not guilty to the charges in the indictment. Both demanded a trial by jury which was set for May 20, 1974. Upon petitioners motion for continuance, which was granted on May 15, 1974, the trial proceedings were continued until June 21, 1974.

On June 19, 1974, Edgar Forrest Critzer filed a memorandum in support of a motion to suppress evidence. This motion was heard in open court on June 20, 1974. In addition, a motion was made by the petitioners for severance of their trials. Both motions were denied by the court. It is this denial of the motion to suppress evidence, the similar denial of an identical motion made later by Robert. W. Critzer, and the subsequent admission of the tape recordings as evidence at their trials which petitioners contend constitute reversible error.

Robert W. Critzer renewed his motion for a severance of the trial and was granted a continuance of his trial until July 2, 1974.

Edgar Forrest Critzer was tried by a jury for the offenses alleged in the indictment on June 21, 1974 in the United States District Court for the Eastern District of Virginia at Richmond. Jurisdiction of this court was under Title 18 U.S.C. § 3231. Over the continuing motion to suppress the evidence, the court admitted to evidence a certain tape recording of the conversation between Edgar Forrest Critzer and Grady Wortham. After the jury retired it requested a transcript of the tape recordings as many of the jurors could not hear them. The court allowed the jury to hear the tapes as many times as they desired. This replaying of the tapes for the jury was with the consent of Edgar Forrest Critzer, coupled with his continued objection to the propriety of admission of this recording to evidence. The jury returned a verdict of guilty on counts Number One and Number Three in the indictment.

On June 24, 1974 Edgar Forrest Critzer filed a motion for a new trial which was denied on July 5, 1974. He was sentenced on July 18, 1974 for a period of Three (3) years on count Number One and a period of Five (5) years on count Number Three, the sentence on count Number Three to run concurrently with the sentence on count Number One.

Robert W. Critzer was tried before a jury on counts Number Two and Number Three in the indictment on July 2, 1974 in the United States District Court for the Eastern District of Virginia at Richmond. Mr. Critzer renewed his continuing motion to suppress the evidence relating to submission of the tape recordings of the conversations between himself and Grady Wortham. Mr. Critzer was found guilty of counts Number Two and Number Three of the indictment. Mr. Critzer filed a motion for new trial which was denied on July 8, 1974. Robert W. Critzer was sentenced on July 31, 1974 to a period of Eighteen (18) months, which was reduced to

Six (6) months upon a condition of restitution of certain monetary sums, and two concurrent terms of probation of Three (3) years each.

Edgar Forrest Critzer filed a notice of appeal with the United States Court of Appeals for the Fourth Circuit on July 24, 1974. Robert W. Critzer filed a similar notice of appeal on August 5, 1974. On September 10, 1974 the Court of Appeals issued on order consolidating the appeals for all argument and briefing. Oral arguments were heard before Associate Justice Clark and Circuit Judges Russell and Field on January 10, 1975. The convictions were affirmed by a decision entered February 12, 1975.

By order filed February 26, 1975 the mandates of the court were stayed pending filing of this petition for a writ of certiorari in the Supreme Court of the United States.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I.

Under present federal law, it is unlawful to procure a person to intercept any wire or oral communication. 18 U.S.C. § 2511 (1) (a). It is further unlawful to procure another person to use any electronic, mechanical or other device to intercept oral communications when such device transmits communications by radio. 18 U.S.C. § 2511 (b) (ii). Any wire or oral communication so intercepted is not admissible in evidence before a judicial or quasi-judicial body or legislative committee of the United States, a State or a political subdivision thereof if the disclosure thereof would be in violation of Chapter 119 of Title 18 of the United States Code. 18 U.S.C. § 2515. One of the statutory exceptions to the

above law is where one party to the communication has given prior consent to such interception. 18 U.S.C. § 2511 (2) (c). The key element in this law is consent; without it any recording of the oral communication would be inadmissible as evidence pursuant to 18 U.S.C. § 2515.

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973) the Supreme Court stated that the precise question before the Court was "...what must the prosecution prove to demonstrate that a consent is voluntarily given" 412 U.S., at 223. The Court provided an enumeration of the elements of consent by stating "...that the question whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of the circumstances." 412 U.S. at 227. The Court went further to say that "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." 412 U.S., at 228.

The consent given by Grady Wortham in the case before this Court must meet the "totality of circumstances" test which was laid down in the *Schneckloth* case. Grady Wortham did not seek out an itinerant F.B.I. agent to volunteer the use of his automobile as a situs for an electronic surveillance device. After his arrest on charges of impersonating a federal officer, he was contacted on three occasions by agents of the F.B.I. concerning cooperation in the investigation of the case. On at least one occasion, the request was made while Mr. Wortham was in the custody of the F.B.I. Although there was never an offer of leniency explicitly made, he admitted that he gave consent to the planting of the electronic device in the hope that he would gain leniency as he realized the gravity of the charge against him. In *Schneckloth*, the Court stated that "...for no

matter how subtly the coercion were applied, the 'resulting consent' would be no more than a pretext for police intrusion against which the Fourth Amendment is directed" 412 U.S., at 228.

Grady Wortham made his decision to cooperate with the F.B.I. agents after they had confronted him with the fact that they had evidence against him which he knew could lead to his conviction. Facing this he was clearly in a vulnerable subjective state. He testified at the hearing on the Motion to Suppress Evidence that he felt that cooperation would help his case. He was apparently not intelligently concerned with the Fourth Amendment rights he was relinquishing and did not have the benefit of counsel to advise him. The focus of his thinking at the time of his "consent" must certainly have been influenced by the presence and demeanor of the F.B.I. agents present as well as the custodial nature of his surroundings. Petitioners contend that this is specifically the state of vulnerability contemplated by this court when stating in *Schneckloth* "In examining all surrounding circumstances to determine if, in fact, the consent to search was coerced, account must be taken of the subtley coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." 412 U.S. at 229.

The Court of Appeals below erred in failing to find that the "consent" given by Grady Wortham was invalid because of the coercion and vulnerable subjective state inherent in the circumstances surrounding this consent and thereby rendered a decision in conflict with the Supreme Court's decision in *Schneckloth*, the applicable and controlling decision in this case.

II.

The Fourth Amendment to the United States Contitution guarantees each citizen that he will be

secure from unreasonable searches and seizures. The most recent Supreme Court decision dealing with the Fourth Amendment as it applies to wiretapping and electronic eavesdropping is United States v. White, 401 U.S. 745 (1971). In *White*, the Court found nothing in the Fourth Amendment to bar testimony of federal agents obtained by eavesdropping on a conversation between a government informer and defendant White by means of a radio transmitter concealed on the informer. No warrant was obtained to conduct this electronic surveillance. At the trial of White, the informer was unavailable and the testimony of the eavesdropping federal agents was admitted. The main opinion in this case, however, was joined by only four justices, and but for a disagreement over the applicability of Desist v. United States, 394 U.S. 244 (1969), which held that Katz v. United States, 389 U.S. 347 (1967), applied only prospectively, there would probably have been a single opinion joined by four justices holding that On Lee v. United States, 343 U.S. 747 (1952), was no longer a current expression of the law.

The ninth justice, Mr. Justice Black, adhered to his disent in *Katz*, *supra*. Therein he had written the sole dissenting opinion, holding that the Fourth Amendment didn't apply to any form of eavesdropping, electronic or otherwise. This argument is not an issue here as the holding in *Katz* clearly established that the Court has broadened its interpretation of the scope of the Fourth Amendment to hold that warrantless electronic surveillance activitied by law enforcement officers could not be directed against private conversations even if no trespass upon a private, constitutionally protected place occurred. *On Lee*, *supra*, stands for the proposition that warrantless secret transmission of a private conversation to law enforcement officers is permissible if one of the parties participating consents.

White, *supra*, involved a pre-*Katz* fact situation and a multiplicity of opinions resulted. If the *White* court had been presented with a post-*Katz* fact situation, wherein physical trespass and *Desist*, *supra*, would no longer be in issue, the resulting decision would probably have been a 4 - 4 split on the continued viability of *On Lee*.

The method used to obtain the tape recorded conversations in the present case demonstrates a substantial departure from those used by law enforcement officers in most electronic surveillance cases previously considered by this Court. The significance in terms of Fourth Amendment rights is that in prior cases the accused defendant was the principal insurer of the privacy of the conversation, generally instituting it and, if an informant or undercover agent was involved, inviting him to engage in conversation of an incriminating nature. See *Desist*, *supra*, *Katz*, *supra*, Lopez v. United States, 373 U.S. 427 (1963), *On Lee*, *supra*.

The present case is distinguishable from these in that the informant, Grady Wortham, at the direction of F.B.I. agents, created an environment in which the Critzers would believe they were involved in private conversations and were thereby lured into speaking freely. The recordings admitted as evidence in the District Court below contain references to the Critzers' reliance on the privacy of the conversation in progress. This situation represents a departure from that considered in the above cited cases and places a different perspective on the possibilities of potential violations of Fourth Amendment rights. For example, in *Lopez*, *supra*, the defendant invited the agent/informant to return to defendant's place of business on a specific date and then attempted to take the agent into his confidence and assure him of the confidentiality of their conversation saying "... I'd like you to be on my

side . . . [I]f we can benefit something by it individually, let's keep it that way and believe me anything that transpires between you and I, not even my wife or my accountant or anybody is aware of it." 373 U.S., at 431.

The multiplicity of opinions in *White*, *supra*, leaves the present viability of the *On Lee* concept of assumption of the risk in private conversations somewhat clouded. "My Brother WHITE argues that *On Lee* is still sound law. My Brothers DOUGLAS and HARLAN argue that it is not. Neither position commands the support of a majority of the Court." 401 U.S., at 755. (Mr. Justice Brennan, concurring in the result.) This is particularly true in a fact situation such as that presented by the instant case. The Justices' in their opinions in *White* attached considerable importance to the impact of *On Lee* upon the Fourth Amendment rights of average citizens. For example, Mr. Justice Douglas in his dissenting opinion said

> "It is urged by the Department of Justice that *On Lee* be established as the controlling decision in this field. I would stand by *Berger* and *Katz* and reaffirm the need for judicial supervision under the Fourth Amendment of the use of electronic surveillance which, uncontrolled, promises to lead us into a police state." 401 U.S., at 760.

Petitioners herein contend that the *On Lee* issue is essentially unresolved by this Court and constitutes a substantial federal question. The Court of Appeals below has received arguments on this issue and has in effect decided the question. Petitioners submit that they have a real interest in the resolution of this issue and that this is an appropriate case for this court to grant a writ of certiorari.

CONCLUSION

For the foregoing reasons Petitioners submit that the United States Court of Appeals for the Fourth Circuit erred in failing to find reversible error in the denial by the United States District Court for the Eastern District of Virginia, at Richmond, of the Motions to Suppress tape recordings and the subsequent admission of these tape recordings as evidence in Petitioners' trials and that a writ of certiorari to the Court of Appeals should issue to bring the questions presented before this Court.

Respectfully submitted,

HUMES J. FRANKLIN, JR.
Counsel for Petitioners

P. O. Drawer 1140
Waynesboro, Virginia 22980

APPENDIX OF JUDGMENTS, CONSTITUTIONAL PROVISIONS, AND STATUTES

United States of America vs.

United States District Court for

DEFENDANT: EDGAR FORREST CRIPPEN

EASTERN DISTRICT OF VIRGINIA - RICHMOND DIVISION

DOCKET NO. ▶ CR 74-~~00~~78-R

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: July DAY: 18 YEAR: 1974

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL James J. Franklin, Jr., Esquire (Name of counsel)

FILED

JUL 19 1974

CLERK, U. S. DIST. COURT RICHMOND, VA.

PLEA, FINDING, JUDGMENT

The court has adjudged on June 21, 1974 (date), that, the defendant having pleaded

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE,

[X] NOT GUILTY ~~as charged in Counts 1 and 2 of the indictment~~

and there being a finding ~~verdict~~ of guilty, as charged in Counts 1 and 2 of the indictment

Defendant has been convicted as charged in Counts 1 and 2 of the indictment assaulting and pretending to be an officer and employee of the United States in violation of Title 18, U.S.C., Section 912 and 1 and of the offense of conspiracy to defraud in violation of Title 18, U.S.C., Section 371

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on Count 1 of the indictment and for a period of FIVE (5) YEARS on Count 3 of the indictment.

SPECIAL CONDITIONS OF PROBATION

The sentence on Count 3 of the indictment shall run concurrently with the sentence imposed on Count 1 of the indictment.

The defendant shall be given credit for time spent incarcerated while awaiting trial and sentencing in this case.

INSTRUCTIONS

If sentence is imposed: Enter (1) sentence or sentences specifying counts if any, (2) whether sentences run consecutively or concurrently, (3) any other conditions and (4) commencement date. Each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence. (5) whether defendant is to be further imprisoned until payment of fine or fines and cost or until he is released as otherwise provided by law.

If execution of sentence is suspended enter (in addition to items 1 thru 5 above) the fact regarding the suspension or the sentence(s) and the period of probation.

If imposition of sentence is withheld and probation ordered enter the following: The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of [ ] years from this date. If more space is needed continue on a blank sheet. Sign each sheet. Where probation is ordered the defendant must be instructed as to the conditions thereof.

GENERAL CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall during the period of probation, conduct himself as a law abiding citizen and shall observe all conditions of probation prescribed by the court. TO THE DEFENDANT: You shall (1) not leave the judicial district without permission of the court or probation officer; (2) report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month; (3) answer all reasonable inquiries by the probation officer and follow his instructions; (4) support your legal dependents, if any, to the best of your ability. When not employed or excused by the probation officer for lawful reasons, you shall work regularly at a lawful occupation and shall notify the probation officer at least ten days prior to any change in employment or residence. You shall not own, possess, or have under your control any firearm or other dangerous weapon. You shall not have any association with persons engaged in criminal activity and shall not associate with persons convicted of a felony unless granted permission to do so by the probation officer. You shall permit a probation officer to visit you at reasonable times at your home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer. You shall notify the probation officer within seventy-two hours of any arrest or questioning by a law enforcement officer. You shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court. You shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court. You shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

Signed by: U.S. District Judge / U.S. Magistrate

Date Ordered: 7-19-74 (date)

Date Entered: (date)

CERTIFIED AS A TRUE COPY ON: (date)

By: (Deputy Clerk)

United States of America vs.

United States District Court for

DEFENDANT: ROBERT W. CRITZER

EASTERN DISTRICT OF VIRGINIA - RICHMOND DIVISION

DOCKET NO. ▶ CR 74-0076-R

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: July 31, 1974

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL — Hunes J. Franklin, Jr., Esquire (Name of counsel)

FILED
JUL 31 1974
CLERK, U. S. DIST. COURT
RICHMOND, VA.

PLEA, FINDING, JUDGMENT

The court has adjudged on July 31, 1974 (date), that, the defendant having pleaded

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea,

[ ] NOLO CONTENDERE,

[X] NOT GUILTY as charged in Counts 2 and 3 of the indictment

and there being a finding/verdict of guilty as charged in Counts 2 & 3 of the indictment,

Defendant has been convicted as charged in Counts 2 and 3 of the indictment aiding and abetting co-defendant in assuming and pretending of the offense(s) of to be an officer and employee of the United States with the intent to defraud in violation of Title 18, U.S.C., Sections 2 and 912 and of the offense of conspiracy to defraud in violation of Title 18, U.S.C., Section 371

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: under the provisions of 18 USC § 3651

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS on Count 2; and on the condition that the defendant be confined in a jail or treatment institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment on Count 2 is hereby suspended, and the defendant is placed on probation for a period of THREE (3) YEARS on Count 2.

The imposition of sentence is hereby suspended on Count 3, and the defendant is placed on probation for a period of THREE (3) YEARS on Count 3.

The period of probation imposed on Count 3 shall run concurrently with the period of probation imposed on Count 2, and the periods of probation shall commence immediately upon the defendant's release from confinement under Count 2.

SPECIAL CONDITIONS OF PROBATION

The defendant shall deliver each month the sum of $100.00 to the Probation Office of this Court to be forwarded by said office to Mrs. Eugene Smalarus, the victim in this case, until such time as all the money taken from her plus interest at the rate of Six (6) Per Cent per annum from 19 April 1972 has been paid to her. Said payments shall be supplemental to such similar payments being made by one Grady Worthen, and the obligation to make these payments shall cease whenever the Probation Office of this Court determines that the money with interest has been repaid in full, and that this defendant has paid a minimum amount equal to one-half of said sum.

GENERAL CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law abiding and virtuous citizen and observe all conditions of probation prescribed by the court. TO THE DEFENDANT – You shall:
(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer;
(2) associate only with law abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any change in your place of residence;
(6) follow the probation officer's instructions and report as directed.
The Court may change the conditions of probation, reduce or enlarge the period of probation, and at any time during the probation period or within the maximum probation period of [illegible] permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Commitment Order [7-31-74] (date)

CERTIFIED AS A TRUE COPY ON THIS DATE _____

By _____ (Deputy Clerk)

Page 1 of 1 Pages

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

/s/ D. Dortch Warriner
(date)

CLERK ▶ W. FARLEY POWELL, JR.

COPY 1 (ORIGINAL)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74 2028

UNITED STATES OF AMERICA, Appellee,

-versus-

EDGAR FORREST CRITZER, Appellant.

No. 74-2029

UNITED STATES OF AMERICA, Appellee,

-versus-

ROBERT W. CRITZER, Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued: January 10, 1975. Decided: February 12, 1975

Before CLARK, Associate Justice,* RUSSELL, Circuit Judge, and FIELD, Circuit Judge.

Richard A. Scholes (Humes J. Franklin, Jr., on brief) for Appellant in Nos. 74-2028 and 74-2029; David G. Lowe, Assistant United States Attorney, (David H. Hopkins, United States Attorney, on brief) for Appellee in Nos. 74-2028 and 74-2029.

PER CURIAM:

Upon consideration of the briefs, record and oral argument, we find no reversible error and affirm the appellants' convictions.

AFFIRMED.

* Supreme Court of the United States (retired), sitting by designation.

Title 18 U.S.C. § 2511.

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be find not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights of property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring reponsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security

information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Title 18 U.S.C. §2515.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived, therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed three copies of the foregoing Brief to David G. Lowe, Esquire, Assistant United States Attorney, Post Office Box 1257, Richmond, Virginia, Counsel for Appellee on or before March 14, 1975.

HUMES J. FRANKLIN, JR.
Counsel for the Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1163

EDGAR FORREST CRITZER
AND
ROBERT W. CRITZER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their intercepted conversations should have been suppressed because (1) the informant who participated in the conversations did not voluntarily consent to the electronic interception and (2) a search warrant was required to conduct the surveillance.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner Edgar Critzer was convicted of impersonating a federal officer, in violation of 18 U.S.C. 912 and 2, and of conspiracy to defraud, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of three and five years' imprisonment, respectively. After a separate jury trial in the same court, petitioner Robert Critzer was convicted of aiding and abetting the impersonation of a federal officer, in violation of 18 U.S.C. 2 and 912, and of conspiracy to

defraud, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment on the aiding and abetting conviction; one year of that sentence was suspended pursuant to 18 U.S.C. 3651, and he was ordered confined to a penal institution for six months. The imposition of sentence on the conspiracy count was suspended, and he was placed on probation for a term of three years. As a condition of probation, he was required to repay the victim at least one-half of the sum defrauded.[1] The court of appeals affirmed petitioners' convictions without opinion (Pet. App. 16).

1. The evidence at petitioner Edgar Critzer's trial showed that petitioners and Grady Wortham drove from Afton to Ashland, Virginia, in April of 1972 (Tr. 21-22).[2] When they arrived in Ashland, petitioner Edgar Critzer obtained a list of names and then entered a telephone booth to call the persons listed (Tr. 23-24).

At approximately 10:00 a.m. on April 19, 1972, Mrs. Eugene Delarue received a telephone call from a person who identified himself as Mr. Wilson, a federal employee (Tr. 6). The man told Mrs. Delarue that he was conducting an audit at her bank and needed to know the amount of her savings account (Tr. 6-7). Mrs. Delarue supplied the requested information (Tr. 7). Later the same day, Mrs. Delarue received a second call from the man identifying himself as Mr. Wilson, a federal employee. In this conversation, he asked her if she knew that two bank employees were stealing her money, and that they had already taken

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[1]Co-conspirator Grady Wortham pleaded guilty to the charge of aiding and abetting the impersonation of a federal officer. He was sentenced to three years' imprisonment, suspended, and he was placed on probation for five years. Restitution was also a condition of his probation.

[2]On appeal, counsel for the parties stipulated that the transcript of Robert Critzer's trial was unnecessary because the proceedings at Edgar Critzer's trial were substantially similar for purposes of the issues raised. We therefore summarize only the evidence at Edgar Critzer's trial. "Tr." refers to the transcript of that trial. "H. Tr." refers to the transcript of the hearing on petitioners' motion to suppress evidence.

about one-half of her savings (Tr. 7). Still later, petitioner Edgar Critzer called Mrs. Delarue again (Tr. 25). He told her to withdraw $2,500 from her bank account and that he would take care of the money and place it in a vault (Tr. 8-9). He also asked Mrs. Delarue not to say anything to anyone about the transaction (Tr. 9). After that call, Edgar Critzer told Wortham and Robert Critzer that Mrs. Delarue was going to the bank (Tr. 27). The three men drove to Mrs. Delarue's house and followed her to the bank (*ibid.*). When she arrived there, Robert Critzer entered the bank to determine whether she was withdrawing the money (Tr. 28). Mrs. Delarue withdrew the $2,500 and returned to her home (Tr. 9).

Petitioners and Wortham thereupon returned to the telephone booth, and Edgar Critzer again called Mrs. Delarue. He told her that a man named Mr. Martin would pick up the money (Tr. 9-10). Wortham and Robert Critzer then went to Mrs. Delarue's house; Wortham entered the house and identified himself as Mr. Martin. He was given the money, and he supplied a receipt (Tr. 10-11, 29, 31-32). He left the house, met with petitioners, and they divided the money (Tr. 33).

2. On February 6, 1974, Wortham was arrested by FBI agents pursuant to an arrest warrant (H. Tr. 23-24). At that time he was asked if he would aid in the investigation of the fraud (H. Tr. 51-52). Wortham told the agents that he "would have to think about it" (*ibid.*). On February 14, 1974, in light of information previously supplied by Wortham, FBI Agent Charles Evans informed Wortham that the FBI wished to record his conversations with petitioners (H. Tr. 17). Wortham was advised that he had no obligation to aid the FBI and that he had a constitutional right not to cooperate (H. Tr. 17). No threats or promises were made, and there was no suggestion that his own case would be affected in any way by his cooperation (H.

Tr. 17, 40-41, 52-53). Wortham consented to the electronic surveillance because he knew the government had evidence incriminating him and believed that his cooperation might be to his benefit (Tr. 41).

Transmitters were subsequently placed on Wortham's person and in the dashboard of his car (H. Tr. 13-14). Prior to each monitored conversation, Wortham was advised of his constitutional rights, including his right to counsel, and was told that he had no obligation to aid the FBI (H. Tr. 17, 37). Wortham signed written waivers stating that he understood his rights and desired to cooperate (H. Tr. 17). Throughout the investigation, Wortham stated that he did not desire an attorney (H. Tr. 37).

On March 21 and March 23, 1974, Wortham initiated conversations with Robert Critzer (H. Tr. 25-26, 29). The conversations occurred in Wortham's automobile in a parking lot in Stuart's Draft, Virginia (H. Tr. 15-17). On March 28, 1974, Wortham initiated a conversation with Edgar Critzer in Waynesboro, Virginia (H. Tr. 29-30). Each of the conversations was recorded and admitted into evidence at petitioners' respective trials (H. Tr. 14).

3. Petitioners contend (Pet. 7-9) that the intercepted conversations should have been suppressed because Wortham's consent to the surveillance was involuntary. According to petitioners, Wortham was coerced by the thought that his assistance to the investigation would work to his benefit in a future prosecution. There is no merit to this claim.

Nothing in the record indicates even the most subtle coercive tactics on the part of the government. No threats or promises were made to Wortham, he was not told that his consent to the surveillance would help him, and he was repeatedly advised of his constitutional rights. He was

specifically warned that he had a right not to cooperate (H. Tr. 17). Absent any indication of coercion on the part of the government, the giving of such a warning—which goes far beyond what this Court has required in analogous situations (see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 231-233)—demonstrates beyond any doubt that Wortham's consent was voluntary.[3] Moreover, Wortham himself considered his consent to be voluntary (H. Tr. 40). In sum, the district court properly determined as a fact "from the totality of all the circumstances" that Wortham's consent was "voluntary." *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227.

Moreover, while Wortham may well have hoped that his cooperation would redound to his benefit—and while it may indeed ultimately have done so—there is nothing improper about this and his consent is in no way rendered involuntary thereby. In sum, the court of appeals found no reason to disturb the district court's voluntariness finding, and, we submit, there is none.

4. Petitioners also urge (Pet. 9-12) that the intercepted conversations should have been suppressed because no search warrant was obtained. It is settled, however, that when one party to a conversation consents to electronic surveillance, such an interception is lawful and no search warrant is required. *United States* v. *White*, 401 U.S. 745; *United States* v. *Santillo*, 507 F.2d 629 (C.A. 3); *United States* v. *Bonnano*, 487 F.2d 654, 657-658 (C.A. 2); *Holmes* v. *Burr*, 486 F.2d 55, 60 (C.A. 9), certiorari denied, 414 U.S. 1116; *United States* v. *Fanning*, 477 F.2d 45, 47-48 (C.A. 5), certiorari denied, 414 U.S. 1006. See 18 U.S.C. 2511 (2)(c).

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[3]In *Schneckloth* the Court said that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning" (412 U.S. at 231).

Petitioners urge that the situation presented by this case may be distinguished from this Court's prior decisions upholding warrantless consensual surveillance (Pet. 11)[4] because, after *Katz* v. *United States*, 389 U.S. 347, the touchstone is whether there was a constitutionally justifiable expectation of privacy, and, they say, such an expectation existed here. That claim is foreclosed, we submit, by this Court's decision in *United States* v. *White, supra*. See also *Hoffa* v. *United States*, 385 U.S. 293. While the surveillance in *White* occurred prior to the Court's opinion in *Katz*, the plurality opinion in *White* made clear that *Hoffa* "was left undisturbed by *Katz*" (401 U.S. at 749) and that there is no constitutionally protected expectation of privacy when one party to a conversation consents to electronic surveillance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[4]See *Lopez* v. *United States*, 373 U.S. 427; *On Lee* v. *United States*, 343 U.S. 747.